THE FEDERAL ANTI-TRUST LAW AND THE "RULE OF REASON."

AT THIS time, when the subject of trust decisions and trust legislation as embodied in the Sherman Anti-Trust Law is occupying a large share of public attention, any additional light which can be thrown upon a situation which, by reason of an almost infinite variety of opinion, has become somewhat confused, ought to be deemed pertinent and timely. The views here set forth are presented in the hope of shedding some light upon that situation. They are given as the result of the writer's professional experience derived both from the position occupied by him as a government prosecutor under the Sherman Anti-Trust Law, and from the position later occupied by him as counsel for defendants in prosecutions instituted by the government under the law. The writer indulges the hope that the practical experience upon which these observations are based will render them of some value.

I. The Conditions Which Brought About the Passage of the Sherman Anti-Trust Law

The Federal Anti-Trust Law [1] has been known popularly as the Sherman Anti-Trust Law, because the bill which culminated in that law was introduced in the United States Senate by Senator Sherman of Ohio. The bill thus introduced by him was, however, completely changed by the Judiciary Committee of the Senate and as adopted by both Houses of Congress was totally different from the form of the bill as first presented by Senator Sherman.

The changes thus made were principally the work of Senators Edmunds and Hoar. It is the uniform opinion of those who have carefully studied the subject that no statute was ever passed by Congress involving a question of substantive law, which re-

[1] Act of July 2, 1890, 26 Stat. 209, C. 647.

ceived more thoughtful attention at the hands of profound and capable lawers in Congress than the Anti-Trust Law which was adopted by Congress and became a law on July 2, 1890.

The immediate occasion which brought about the passage of this law was the existence at that time of a number of vast aggregations of capital which had then monopolized or bade fair soon to monopolize many important branches of trade in this country. The most conspicuous examples of these combinations were the Sugar Trust, the Whiskey Trust, and pre-eminently the Standard Oil Trust.

Without attempting to enter into any consideration of the debates which the passage of the Anti-Trust Law occasioned in Congress, it must suffice to say that the most confident expectations were therein expressed that the passage of this law would speedily put an end to these monopolistic combinations and to the evil conditions to which they gave rise.

We shall, however, try to point out, in the cursory survey which we shall make of the subsequent history of that law, why that expectation was in large measure disappointed.

For the present purpose it will not be necessary to quote the text of the law beyond the portion which follows:

> "An Act to protect trade and commerce against unlawful restraints and monopolies.
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> "Be it enacted, etc., that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal."

The foregoing extract will furnish a sufficient basis for presenting the apparently conflicting views of the courts with reference to the construction of that statute.

It may be broadly asserted that, with the exception of such parts of the statute as relate to matters of procedure and practice, and with the exception that the second section of the statute is in an immaterial sense an enlargement of the common law, the statute itself amounts to no more than a declaration of the common law upon the subject of restrictions of trade.

It is well settled that, in the Federal jurisprudence, the common law with relation to crimes has no existence. It was on

account of this fact and the further fact that, prior to the passage of the Sherman Anti-Trust Law, there was no Federal statute governing the subject, that until the Act of July 2, 1890, there was no jurisdiction in the Federal Government to prevent or to punish restraints of trade or unlawful conspiracies and combinations to restrain trade.

In the course of the debates in the Senate which culminated in the passage of the law, Senator Sherman said: [2]

> "It does not announce a new principle of law but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."

Senator Vest said: [3]

> "We have affirmed the old doctrine of the common law in regard to all interstate and international transactions, and have clothed the United States Courts with authority to enforce that doctrine by injunction. We have put in also a grave penalty."

The statement is ventured that all of the prevailing decisions of the United States Supreme Court under that law would have been decided in the same way in which the Supreme Court has decided them, if the Sherman Law, so far as its substantive provisions are concerned, had merely provided in proper phraseology that the existing common law on the subject was declared to be the law of the United States and had provided appropriate penalties.

The scope of this paper makes it impossible to expand this contention at this time. Its propriety and correctness may, however, be shown concisely by a reference to the fundamental provision of the laws of the State of New York governing the subject, which is contained in the following provision of the Penal Law of that State, to wit:

> "If two or more persons conspire * * * to commit any act injurious * * * to trade or commerce * * * each of them is guilty of a misdemeanor."

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[2] Senate Debates, March 21, 1890, 21 Cong. Rec., p. 2456.
[3] Senate Debates, April 8, 1890, 21 Cong. Rec., p. 3146.

The revisers of the Penal Code of the State of New York, able lawyers of their day, who drew this provision, stated that it was intended to be merely an embodiment of the common law.

The courts of that State, in construing the quoted provision, have repeatedly declared that it represented merely a declaration of the common law; and they have in innumerable cases construed it in the most comprehensive manner as being sufficient to prevent and to punish, in a degree quite as drastic as the Federal courts have done under the Sherman Anti-Trust Law, all restraints of trade that have been submitted to them for decision.

II. The Sugar Trust Case.

The first case of importance, in fact the first case of any description, under the Sherman Law, which received the attention of the United States Supreme Court, was the case of United States *v.* E. C. Knight Co.,[4] popularly known as the Sugar Trust case. In that case, it was charged by the government that the defendants, "being in control of a large majority of the manufactories of refined sugar in the United States, had acquired through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business."

The Supreme Court held:

> "That the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not be suppressed under the provisions of the Act of July 2, 1890, * * * in the mode attempted in this suit; and that the acquisition of Philadelphia refineries by a New Jersey corporation, and the business of sugar refining in Pennsylvania, bear no direct relation to commerce between the States or with foreign nations."

Putting it briefly, the substance of the decision seems to be that the situation there presented involved an intrastate and not an interstate transaction and was therefore not within the purview of the Federal Anti-Trust Law.

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[4] 156 U. S. 1.

The subsequent history of the Sherman Law shows that the effect of this decision was most unfortunate. The confusion and the erroneous impressions which were caused by it are best exemplified by the statement contained in a report made to the House of Representatives by Attorney-General Harmon on February 8, 1896, in response to a resolution of the House adopted on January 7, 1896, requesting the Attorney-General to report what steps, if any, had been taken by him "to enforce the law of the United States against the trusts, combinations and conspiracies in restraint of trade and commerce, and what further legislation, if any, is needed, to protect the people against the same." In that report he said:

> "The Act of July 2, 1890, commonly called the Sherman Anti-Trust Law, as construed by the Supreme Court" (thereby evidently referring to the Knight case) "does not apply to the most complete monopolies acquired by unlawful combination of concerns which are naturally competitive, though they in fact control the markets of the entire country, if engaging in interstate commerce be merely one of the incidents of their business and not its direct and immediate object. *The virtual effect of this is to exclude from the operation of the law, manufacturers and producers of every class, and probably importers also.*" (Italics mine.) * * * "The limitation of the present law enables those engaged in such attempts to escape from both State and Federal Governments, the former having no authority over interstate commerce, and the latter having authority over nothing else."

The italicized portion of the above quotation makes clear that the learned Attorney-General misconceived, and it is perhaps proper to say, that he quite naturally misconceived, the true scope of the Sherman Law, as a result of the unfortunate decision in the Knight case.

Subsequent decisions of the Supreme Court, notably in the Addyston case, the Traffic cases, the Standard Oil case, the Tobacco case, which will be discussed *post,* and many others, clearly show that the opinion thus expressed by the Attorney-General was erroneous. This circumstance is of importance when it is

considered that, as a result of this misconception, which, it may be added, was shared by the profession generally, the Sherman Law was for a long time deemed to be inapplicable to the many varieties of trusts and other industrial combinations which soon thereafter, and probably because of that decision, began to increase until nearly every branch of trade came under their domination. It seems safe to assert that no single circumstance was so potent in depriving the Sherman Law of the effectiveness which was subsequently imparted to it by later decisions of the Supreme Court, as the decision in the Knight case.

In all of the conspicuous cases involving attacks by the government under the Sherman Law against trusts or industrial combinations, the Knight case has been cited by the defendants as justifying their contention that the Sherman Law is not applicable to such trusts or industrial combinations. Indeed, counsel for defendants in some of such cases have boldly asserted that the adjudication by the Supreme Court in the Knight case had become a rule of property and that to overrule it would make wrecks of the enterprises inaugurated by the combinations then under attack.

There can be no doubt that, beginning with the Addyston case, the Supreme Court, in a uniform line of decisions culminating in the Standard Oil and the Tobacco cases, has distinguished the force and application of the Knight case to such an extent as, for all practical purposes, to overrule it.

It is a fact, well recognized by expert students of the subject, that the misconception which the decision of the Supreme Court in the Knight case caused, was responsible in a very high degree for the fact that thereafter the Sherman Law remained for many years virtually a "dead letter" upon the statute book. Instead of serving as an effective deterrent to the continuance of monopolistic combinations, as its framers intended it to be, the Sherman Law, as thus seemingly devitalized by the Supreme Court in the Knight case, served for several years thereafter, and until the misconception caused thereby was, by later decisions, corrected, rather as high evidence of the impotency of the Federal jurisprudence to cope with the subject at all.

III. The Addyston Case.[5]

The first case which was presented to the Supreme Court, under the Sherman Law, affecting an industrial agreement or combination in restraint of trade, after the decision in the Knight case, was the Addyston case. It was decided by the Supreme Court on December 4, 1899, nearly six years after the decision in the Knight case.

The case was heard upon an appeal from a decision of the Circuit Court of Appeals, the opinion in which was written by Judge Taft (later President Taft). As indicating the important bearing which the Knight decision was deemed to have at that time with respect to the Sherman Law, the following is quoted from the opinion of Judge Taft in reversing the decision of the court below which dismissed the bill. Judge Taft said:[6]

> "The learned judge who dismissed the bill at the Circuit was of opinion that the contract of association only indirectly affected interstate commerce, and relied chiefly for this conclusion on the decision of the Supreme Court in the case of United States against E. C. Knight Co."

And further:[7]

> "We have thus considered and quoted from the decision in the Knight case at length, because it was made the principal ground for the action of the court below, and is made the chief basis of the argument on behalf of the defendants here."

Judge Taft then proceeded, and, so far as we are aware, it was the first time that any court had so done, to put aside the Knight case as an authority for the general proposition which was urged by the defendants in the Addyston case, and which was substantially to the same effect as is set forth in the extract above quoted from the report of Attorney-General Harmon. He does so in the following language:[8]

> "To give the language of the opinion in the Knight case, the construction contended for by defendants would be to as-

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[5] Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211.
[6] 85 Fed. 296.
[7] 85 Fed. 297.
[8] 85 Fed. 299.

> sume that the court, after having in the cleverest way distinguished the case it was deciding from a case like the one at bar, for the very purpose of not deciding any case but the one before it, then proceeded to confuse the cases by using language which decided both. We cannot concur in such an interpretation of the opinion."

For the first time, then, the narrow limits of the Knight decision were defined; and for the first time the authority of the Knight case as denying to the Sherman Law the power to repress industrial combinations or agreements in restraint of trade, was negatived.

When the Addyston case reached the Supreme Court, that court disposed of the defendant's contention with respect to the Knight case in the following language: [9]

> "We are also of opinion that the direct effect of the agreement or combination is to regulate interstate commerce, and the case is therefore not covered by that of the United States *v.* E. C. Knight Co."

Justification for the space here devoted to the Addyston case is to be found in the fact that the decision in that case first corrected the wide-spread misconception which had theretofore existed with respect to the applicability of the Sherman Law to industrial or trade agreements or combinations. It is highly important to note that from the time of the decision in the Addyston case, no misconception or doubt any longer existed, or, at any rate, needed to exist, and that thereafter the decisions of the Federal Courts in construing the Sherman Law as bearing upon industrial agreements and combinations of the kind which were then and ever since have been so common, moved forward in an unbroken line to the effect that such agreements were within the purview of the Sherman Law and that combinations or agreements such as characterized the Sugar Trust and other like combinations were forbidden by that law.

The check upon the enforcement of the Sherman Law, which had been placed upon it as a result of the Knight case, was thereby removed. Unfortunately, however, in the meantime, the

[9] 175 U. S. 211, 238.

Sherman Law had for all practical purposes become dormant and impotent, so that the promotion and formation of industrial combinations and trusts proceeded with renewed vigor and the industries of the country were virtually taken out of independent and competitive ownership and placed under the control of monopolistic combinations.

We repeat the assertion that this result, the evil effects of which are still so manifest, is attributable to the decision in the Knight case more than to any other circumstance.

At the risk of digression, the Addyston case, as decided by Judge Taft in the Circuit Court of Appeals, must again be alluded to in order to point out that the opinion written by Judge Taft is a memorable contribution to the juridical literature of this country, not only because in it he first clearly pointed out the proper limitations of the Knight case, but because he therein presented a most masterly exposition of the common law and the statute law bearing upon restraints of trade. His opinion may well serve as a text-book upon the subject of unlawful restraints of trade.

IV. The Traffic Cases.[10]

In discussing the Addyston case before discussing the Traffic cases, we have departed from the correct chronological order, both of the Traffic cases having been decided by the Supreme Court prior to the Addyston case. This departure has been made because the decision in the Knight case did not in any way affect the decisions in the Traffic cases, whereas, as above shown, the Knight case was an important factor in the Addyston case, and it was therefore deemed more logical to treat the Addyston case out of its chronological order so as thereby to supplement the consideration of the Knight case.

Just as the Knight case has been here discussed because of its great importance in its bearing upon the subsequent interpretation of the Sherman Law, and just as the Addyston case

[10] United States *v.* Trans-Missouri Freight Association, 166 U. S. 290; United States *v.* Joint Traffic Association, 171 U. S. 505.

has been here discussed because it corrected the misconception which had so disastrously affected the administration of the Sherman Law, so now we adduce the Traffic cases as constituting an outstanding feature of importance in the history of the Sherman Law. This outstanding feature is the circumstance that in the Traffic cases, the Supreme Court for the first time laid down the principle that, under the Sherman Law, *every* restraint of trade, whether *reasonable* or *unreasonable,* is unlawful.

A further notable circumstance in connection with the decisions in the Traffic cases is that in the Trans-Missouri case, Mr. Justice White (now Chief Justice White) declared in precise terms the "rule of reason" which subsequently, in the opinions written by him in the Standard Oil case and the Tobacco case, was advanced by him in the most conspicuous and controlling manner, as the guiding principle by which the Sherman Law must be interpreted.

It thus appears that the now famous "rule of reason" as enunciated by the Chief Justice in the Oil case and the Tobacco case, was not promulgated in those cases for the first time, but had been previously enunciated in the plainest terms by him in his dissenting opinion in the Trans-Missouri case. For whatever historical value this fact may have, we quote the following from the opinion of Mr. Justice White in the Trans-Missouri case: [11]

> "Hence, from the reason of things, arose the distinction that where contracts operated only a partial restraint of the freedom of contract or of trade they were not, in contemplation of law, contracts in restraint of trade. And it was this conception also, which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all its aspects, a contract of that character or one which was necessary to the freedom of contract and of trade."

Thus in substance Mr. Justice White laid down the principle

[11] 166 U. S. 290, 351.

of the "rule of reason;" but, later on [12] he lays down the principle in specific terms thus:

> "If the *rule of reason* no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade?"

And again: [13]

> "It follows that the construction which reads the *rule of reason* out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition."

We shall subsequently, in connection with a discussion of the Oil and the Tobacco cases, speak further of the "rule of reason" in those cases so conspicuously put forward by the Chief Justice.

Students of the subject have found it difficult to reconcile the comprehensive manner in which the prevailing opinions in both of the Traffic cases (each of them written by Mr. Justice Peckham) declare that the distinction which existed at common law between reasonable restraints of trade and unreasonable restraints of trade did not exist under the Sherman Law, with the statement contained in the second of the Traffic cases,[14] wherein Mr. Justice Peckham said: [15]

> "* * * the Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce, and possibly to restrain it."

Moreover, Mr. Justice Peckham in his opinion in the Joint Traffic case,[16] declared that various examples, which were suggested by counsel, of contracts theretofore lawful which would be rendered illegal if the distinction between reasonable and unreasonable restraints of trade were abolished, had "little or no bearing upon the question under consideration."

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[12] Id., p. 355.
[13] Id., p. 356.
[14] United States *v.* Joint Traffic Association, 171 U. S. 505.
[15] Id., p. 568.
[16] 171 U. S. 505, 568.

In the dissenting opinion rendered by Mr. Justice White in the Trans-Missouri case,[17] he cited many similar examples of particular classes of contracts which at the common law were considered partial or reasonable restraints of trade and therefore lawful. He did this for the purpose of showing that, under the construction placed upon the Sherman Law by Mr. Justice Peckham, abolishing the distinction between reasonable and unreasonable restraints of trade, such classes of contracts theretofore deemed lawful would thereafter be deemed unlawful.

In the Joint Traffic case, wherein Mr. Justice Peckham made the statement that the class of contracts of this description "have little or no bearing upon the question under consideration," Mr. Justice White again dissented. He did not, however, render any opinion, apparently resting his dissent upon his opinion in the Trans-Missouri case, inasmuch as the two cases were similar.

In the dissenting opinion of Mr. Justice White in the Trans-Missouri case, there is set forth a most scholarly presentation of the distinction which prevailed at common law between a partial and reasonable restraint on the one hand, and a general or unreasonable restraint on the other hand, the former being at common law lawful and the latter unlawful.

It is perhaps a bold assertion to make, but the assertion is nevertheless made, that the subsequent history of the Sherman Law shows that the subject, as set forth in the Traffic cases, of the distinction between reasonable and unreasonable restraints of trade has proved to be entirely academic. It has had no practical bearing upon the interpretation or enforcement of the Sherman Law in any case that has since come before the courts.

In every case under the Sherman Law which has been decided since the decisions in the Traffic cases were rendered, the decisions, which have been almost, if not uniformly, in favor of the government, have rested upon a state of facts which would have necessitated a finding that such restraints were unlawful even if the common law distinction between reasonable and unreasonable restraints had been explicitly maintained and upheld. In other words, the assertion is confidentially made that no subsequent

[17] 166 U. S. 290.

case has been presented under the Sherman Law, wherein the government has prevailed, where a different result would have been reached if the Sherman Law had in terms provided that only *unreasonable* contracts, etc., in restraint of trade were forbidden. Every case which has been submitted to the courts, in which the Government has prevailed, has been based upon a situation which even at common law would have been declared to constitute an *unreasonable* restraint. Hence, we repeat, the distinction referred to, has in practice, proved unimportant.

V. The Standard Oil and the Tobacco Cases.[18]

These cases, decided by the Supreme Court in 1911, constituted the first cases in which any of the great trusts were subjected to attack in the Supreme Court under the Sherman Law, with the exception of the abortive attack upon the Sugar Trust in the Knight case. They are notable particularly on account of the formal enunciation therein by Chief Justice White of the "rule of reason" as the controlling principle for the interpretation of the Sherman Law.

Upon this ground, the opinion in both cases, each of them written by the Chief Justice, were sharply assailed by Mr. Justice Harlan as constituting "judicial legislation." [19]

Mr. Justice Harlan, moreover, assailed the decisions by declaring that the court "has, by mere interpretation, modified the Act of Congress and deprived it of practical value as a defensive measure against the evils to be remedied;" and, again: [20]

> "* * * that many things are intimated and said in the Court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy."

Mr. Justice Harlan also asserted that the decisions were in effect an overruling of the decisions of the court in the Traffic cases.

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[18] The Standard Oil Co. *v.* United States, 221 U. S. 1; United States *v.* American Tobacco Co., 221 U. S. 106.

[19] Harlan, J., in dissenting opinion in the Oil case, 221 U. S. at p. 99.

[20] Oil case, p. 104.

These criticisms of Mr. Justice Harlan were contained in the dissenting opinion rendered by him in the Oil case. In the Tobacco case, which was decided later, the Chief Justice, *the entire court except Mr. Justice Harlan concurring,* thus replied to that part of Mr. Justice Harlan's dissenting opinion in the Oil case which asserted that the majority opinion in the Oil case constituted in effect an overruling of the decisions in the Traffic cases: [21]

> "In that case (Standard Oil case) it was held, without departing from any previous decision of the court that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the Trans-Missouri Freight Association and Joint Traffic cases, 166 U. S. 290 and 171 U. S. 505). That such view was a mistaken one was fully pointed out in the Standard Oil case and is additionally shown by a passage in the opinion in the Joint Traffic case as follows (171 U. S. 568): 'The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it.' "

As to the remaining criticisms of Mr. Justice Harlan to the effect that the resort to the "rule of reason" has "deprived the statute of practical value" and has "softened or modified" the policy underlying that statute, we assert that an examination of the opinions in the Oil and the Tobacco cases, and particularly the opinion in the Tobacco case, will make clear that, instead of depriving the Sherman Law of practical value and of softening or modifying it, the effect of the two opinions has been to *strengthen and enlarge* the scope of that law.

In the opinion in the Tobacco case,[22] the Chief Justice said:

> "If the Anti-Trust Act is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insists that situation presents

[21] Tobacco case, p. 179. [22] P. 175.

it can only be because that law will be given a *more comprehensive application than has been affixed to it in any previous decision.*"

And, again: [23]

"But the difficulties which arise, from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the Anti-Trust Act. We say of the letter, because while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded, the contention really destroys the great purpose of the Act, *since it renders it impossible to apply the law to a multitude of wrongful acts, which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter.*"

And, again: [24]

"In truth, the plain demonstration which this record gives of the injury which would arise from, and the promotion of the wrongs which the statute was intended to guard against, which would result from giving to the statute a narrow, unreasoning and unheard of construction, as illustrated by the record before us, if possible, serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the Standard Oil case, the application of which rule, to the statute we now, in the most unequivocal terms, re-express and re-affirm."

It seems too clear for discussion that these emphatic statements of the Chief Justice make it clear that the "rule of reason" was invoked not for the purpose of restricting or narrowing the force of the statute as previously construed, but, on the contrary, for the purpose of broadening and enlarging it.

As above quoted, the Chief Justice said that in the Tobacco case the statute "will be given a more comprehensive application than has been affixed to it in any previous decision." The reasoning which follows this statement shows that the purpose of such statement and the purpose of invoking the "rule of reason"

[23] Id., p. 178.

[24] Id., p. 180.

was to bring within the condemnation which the court was about to give to the assailed combination, certain elements and features of the combination which would escape such condemnation if the narrower rule of construction laid down in previous cases were maintained. The court therefore declared its purpose to broaden and enlarge the scope of the statute by viewing it in the "light of reason" so as thereby to ascertain the true intent of Congress in enacting the statute. The court then declared that the statute, thus viewed, brought within its scope all of the elements and features which would otherwise not be included therein.

It is submitted that it is difficult to imagine how the reasoning thus pursued and the result thus reached by the Chief Justice can be construed as involving a curtailment or narrowing of the scope of the statute.

Adopting the objections made by Mr. Justice Harlan, critics of the "rule of reason" have declared that the result of the engrafting upon the statute of the "rule of reason" has been to emasculate that statute. This assertion has been repeatedly made in the two Houses of Congress. The criticism has, however, been met by students of the Sherman Law, who have based their position upon practical experience in the administration and interpretation of that statute, with the diametrically contradictory assertion that the "rule of reason" has given additional vitality and vigor to the statute. They assert that, as stated by the Chief Justice in the Tobacco case,[25] in view of the general language of the statute and the public policy which it manifests, there is no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since *resort to reason* renders it impossible to escape by any indirection the prohibition of the statute.

In other words, they say that, viewed in the light of reason, the statute is now made to penetrate any device or subterfuge which might otherwise successfully conceal a purpose to violate the statute.

Viewed from another standpoint, it is difficult to comprehend the reason for the clamor which has been raised against this feature of the Oil and the Tobacco cases, inasmuch as the subse-

[25] P. 181.

quent decisions of the courts, based expressly upon the decisions in the Oil and the Tobacco cases, have not in the slightest degree relaxed or abated the vigor and force of the statute from the vigor and force which it possessed prior to the rendering of those two decisions.

In a number of very recent cases involving a variety of different situations decided by the Supreme Court since its decisions in the Oil and the Tobacco cases, the statute has been interpreted and enforced with the same degree of strength as before the "rule of reason" was announced. These cases are the following: [26]

Forcible illustration of the fact that the Supreme Court has not, in these later decisions, regarded the statute as having been "softened or modified" by the "rule of reason" is found in the following extract from the opinion of the court in the case of Standard Sanitary Manufacturing Co. *v.* United States,[27] in which Mr. Justice McKenna, referring to previous decisions, said: [28]

> "The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form' or the escape of its prohibitions 'by any indirection' (United States *v.* American Tobacco Co., 221 U. S. 106, 181). Nor can they be evaded by good motives. The law has its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and it may be, of some good results. (United States *v.*

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[26] United States *v.* Terminal Railroad Association, 224 U. S. 383, decided April 22, 1912; Standard Sanitary Manufacturing Co. *v.* United States, 226 U. S. 20, decided November 18, 1912; United States *v.* Union Pacific Railroad Co., 226 U. S. 61, decided December 2, 1912; United States *v.* Reading Company, 226 U. S. 324, decided December 16, 1912; United States *v.* Patten, 226 U. S. 525, decided January 6, 1913; Virtue *v.* Creamery Package Mfg. Co., 227 U. S. 8, decided January 20, 1913; United States *v.* Winslow, 227 U. S. 202, decided February 3, 1913; United States *v.* Pacific & Arctic Railway Co., 228 U. S. 87, decided April 7, 1913; Nash *v.* United States, 228 U. S. 373, decided June 9, 1913.

[27] *Supra.*

[28] P. 49.

Trans-Missouri Freight Association, 166 U. S. 290; Armour Packing Co. *v.* United States, 209 U. S. 56, 62.)"

We have said above that it is difficult to understand the reason for the clamor which has been raised against the "rule of reason" which was invoked in the Oil and the Tobacco cases. We apprehend that this clamor is well justified when the *ultimate results* of those two cases are considered; but that such clamor is misdirected when the "rule of reason" is made the object of its attack. The just basis for such clamor and, in fact, the just explanation of the wide-spread dissatisfaction with the operations of the Sherman Law which seems to exist, is the manner in which the decisions of the Supreme Court in the Oil and Tobacco cases have been *executed*. This is notably true in the Tobacco case.

There is a general belief that in the execution of the Supreme Court's decision in the Tobacco case by the Circuit Court, the administrative officers of the government failed to carry out the declared purposes of the Supreme Court, and that, as a result, the so-called dissolution or disintegration of the Tobacco Trust has proved to be, in large part, unsatisfactory. The same remarks apply, with some modifications, to the final result in the Standard Oil case. The notable consequence has been that these notorious trusts are thought by the community generally to have escaped the punishment which they deserved. The community has attributed the blame for this unfortunate condition upon the Sherman Law itself, and the exponents of the victims of these combinations have declared that these decisions show that the Sherman Law has been weakened and requires strengthening by amendment. As a matter of fact, the complaints of these victims have ample ground, but their criticism should not be directed against the Sherman Law but rather against the manner in which that law was put into effect in the two particular cases in question.

CONCLUSION.

Summarizing the views which have been thus set forth, it appears that the Sherman Law having been enacted in the year 1890 to meet a situation which was then deemed by Congress to be most grave and threatening with respect to the alarming

growth of huge aggregations in restraint of trade, the statute remained practically dormant until, in the year 1895, the Supreme Court, for the first time, considered it in the Knight case. That case resulted in a decision by the court which was generally, if not universally, accepted as meaning that the Sherman Law did not apply to industrial or trade combinations and agreements in restraint of trade. Encouragement was thereby given to persons engaged in business on a large scale to proceed in the monopolistic practices which were then in vogue; and to other persons, to extend the field of their operations by creating new and even larger combinations whose purposes were to engross or control the particular branches of industry which were thereby affected. The next development in the history of the Sherman Law was that, in the year 1899, the Supreme Court considered and decided the Addyston case, and for the first time made it evident that the previously existing views based upon the Knight case were erroneous and that the Sherman Law did in fact apply, as its framers intended that it should apply, to industrial or trade combinations and agreements in restraint of trade. In the same year the Supreme Court considered and decided the two Traffic cases and gave, as was then generally believed, an even wider scope to the statute by declaring that it applied to all restraints of trade, whether the same were reasonable or unreasonable.

In spite of these plain declarations by the Supreme Court of the comprehensive scope of the Anti-Trust statute as affecting not merely common carriers but also industrial combinations of the kind which were then and ever since have been so common, the great impetus which had been given, by the misconceived purport of the Knight case, to the formation of industrial combinations, was not checked. On the contrary, it proceeded with renewed vigor, so that, in the period from 1899 to 1904, the number and the size of the industrial combinations created were far greater than before that period.

The limits of this paper have not permitted of any consideration of the circumstance that in the year 1902, under the administration of President Roosevelt, a policy of drastic and general enforcement of the Sherman Law was begun. Under this

new policy, a suit was brought by the government on March 10, 1902, in the Circuit Court of the United States for the District of Minnesota, against the Northern Securities Company, to dissever the union of the Great Northern Railway Company and the Northern Pacific Railway Company, which union was in effect brought about by the formation of the Northern Securities Company as a holding company of the stock of the two railway companies. On March 14, 1904, the Supreme Court affirmed the decree of the Circuit Court which granted the injunction prayed for by the government, and thereby brought about the dissolution of the Securities Company.

During the remainder of the Roosevelt Administration, the government instituted more than forty prosecutions under the Sherman Law as compared with a total number of only eighteen prosecutions instituted by the government from the time when the Sherman Law was enacted in 1890 to the commencement of the Roosevelt Administration in 1901. It may be noted that it was during this period of great activity under the Roosevelt Administration that the suits against the Standard Oil Company and the Tobacco Trust were begun.

For the first time, then, the business community was aroused to a recognition of the drastic and far-reaching force of the Anti-Trust statute. Lulled into the belief that the statute lay on the statute books as an idle and impotent thing—a belief quite justified prior to the Addyston case because of the mistaken conception of the law as defined in the Knight case—the business community was rudely awakened to a recognition of the fact that the Anti-Trust Law constituted a statutory provision of the most drastic nature. It was perhaps natural that wide-spread criticism should arise and that the contention should be made that the law had not been properly understood by the business community. It was further contended that conflicting decisions of the courts had rendered the meaning of the statute indefinite, obscure and uncertain, so that the community at large could not and did not understand its meaning.

It was perhaps natural that these expressions of alarm and protest should have been made, but it is difficult for the student of the Sherman Law to understand the basis for the contention

that the law was obscure or indefinite in its meaning. Except for the conceded obscurity occasioned by the Knight case, it may be safely asserted that none of the subsequent decisions of the Supreme Court were in any respect vague or uncertain, nor did they in any manner depart from the uniform line of construction to the effect that the Sherman Law, as did the common law for centuries before it, condemned and forbade the wrongful and harmful practices employed by huge aggregations of capital.

The limitations of this paper must make it suffice to say that, beginning with the decision in the Northern Securities case, a great variety of cases were begun by the government under the Anti-Trust statute, the decisions in which almost uniformly upheld the force of the statute as contended for by the government. These decisions culminated, in the year 1911, in the decisions of the Oil case and the Tobacco case.

In these cases the true force and effect of the statute was defined more vigorously, although not upon any new principle, than in any of the previous decisions. In them, as has been pointed out above, the Supreme Court declared the "rule of reason" as being the guiding principle for the interpretation of the statute.

Whatever doubt or uncertainty may have existed prior to these decisions, expert students of the Anti-Trust statute assert that there can no longer be reasonably made any contention or claim that the statute is any longer uncertain or doubtful in its meaning. Aside from the discussion, more or less prevalent, that the distinction between a reasonable restraint and an unreasonable restraint has caused uncertainty—a distinction which, for all practical purposes, as has been shown above, is merely academic—it is confidently asserted that the meaning and the construction of the statute have been made perfectly plain. It has been well said that "the Act under the interpretation of the Supreme Court is clear enough already, save for those who will not understand it, and * * * that in attempting more explicit legislation Congress may stumble upon difficulties of which it now has very little idea."

No attempt has been made in this paper to consider or discuss the economic policy which underlies the Anti-Trust statute, nor the wisdom of the drastic manner in which the statute has been enforced by recent and existing National Administrations. But in so far as is concerned the question of the present certainty of the meaning of the statute and its sufficiency to meet the conditions which it was intended by its framers to meet, without any amendment as to its substantive provisions, we venture to assert that the history of the statute, as outlined in the foregoing pages, shows that no such amendment is necessary.

By the statement above made that no amendment is necessary, reference is had only to the substantive provisions of the Act. No opinion is expressed with regard to the advisability which appears to be under general consideration in Congress at this time, of enacting new and supplementary legislation relating to interlocking directorates, holding companies and similar subjects, for the reason that such proposed legislation is not germane to the subject which has been here discussed.

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